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ALEXANDER L. STEVAS,
CLERK

No. 83-2060

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BOB A. CLAPPS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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44 pp

Question Presented

When, because of prejudicial pretrial publicity, the complexity of the case and the admission into evidence of the Defendant's prior conviction, the Government and the Defendant agree to a bench trial, does Rule 23 of the Federal Rules of Criminal Procedure nonetheless allow the District Court to arbitrarily deny a joint motion for a bench trial and require the parties to be tried by a jury?[1]

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[1]Co-Defendant, Robert Powell was also a Party-Appellant before the Third Circuit Court of Appeals.

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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

BOB A. CLAPPS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Bob A. Clapps, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 19, 1984.

Citation to Opinion Below

The Opinion of the United States Court of Appeals for the Third Circuit in this case is cited as *U.S.* v. *Bob A. Clapps,* Docket No. 81-1474 (Cir. 3, 1984). The Opinion is not yet published and appears in the Appendix hereto at page 1a. The Opinion of the District Court for the Middle District of Pennsylvania denying Post Verdict Motions also appears in the Appendix hereto at page 15a.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 19, 1984. A timely Petition for Re-hearing was denied on May 10, 1984 and this Petition was filed within 60 days of that date in accordance with Rule 20.1 of the Rules

of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Rule Involved

FEDERAL RULE OF CRIMINAL PROCEDURE 23:

(a). Trial by Jury. Cases required to be tried by jury shall be so tried unless the Defendant waives a jury trial in writing with the approval of the Court and the consent of the Government.

Statement of the Case

On November 16, 1982, a Federal Grand Jury sitting in the Middle District of Pennsylvania returned an indictment charging Bob Clapps with 29 counts of mail fraud and 1 count of criminal conspiracy. Co-Defendant, Robert Powell, was also charged with a number of counts of mail fraud and 1 count of conspiracy. The indictment alleged that the Defendants attempted to influence the outcome of elections in 1979 and 1981 by procuring fraudulent absentee ballots.

Prior to trial, the District Court ruled that the Government would be permitted to use Clapp's prior state convictions for bribery, conspiracy and violation of the Public Officials Ethics Act to impeach his credibility if he elected to testify at trial. As a result of this ruling and because of the complexity of the case and enormous pretrial publicity concerning the case and Clapps, both Defendants with the concurrence of the Government, signed written waivers of their right to trial by jury and moved the District Court for a bench trial. The District Court denied the motion without explanation and required the parties to proceed with a jury trial on February 7, 1983. On February 11, 1983, the jury advised the District Court that they were hopelessly deadlocked and a mistrial was declared.

The Government elected to re-try the case. The Defendants, again with the concurrence of the Government, renewed their motion for a bench trial. Again this motion was denied without explanation. During voir dire of the jury on April 5, 1983, it was apparent that many of the jurors had been exposed to pre-trial publicity including the publicity which emanated from the first trial in February of 1983.

During the second trial, one juror complained to the trial judge that immediately after Clapps's prior convictions were introduced in evidence, a number of jurors, contrary to the judge's instructions, began discussing the case, specifically Clapps's prior convictions, referring to him as a "three-time loser." The comments of the jurors which were revealed to the Court through an in chambers voir dire, clearly indicated that the jurors had reached a premature conclusion as to Clapps's guilt because of his prior convictions. At the conclusion of the in chambers voir dire, the Court excused those jurors identified as having participated in these improper discussions. However, even though all of the jurors who had participated in the discussions or had overheard the prejudicial comments were not identified, the Court denied the Defendant's motion for a mistrial.

At the conclusion of testimony and after the District Court's final instructions to the jury, one juror stood up in the jury box and complained that the case was "too complicated" for her to decide. This juror was excused by agreement of the parties.

On April 8, 1984, the case was submitted to the jury and on that same date, they returned a verdict of guilty on 13 counts of mail fraud and 1 count of conspiracy and not guilty on 5 counts of mail fraud.[2] Split verdicts were also returned against Co-Defendant, Powell.

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[2]The remaining charges were either withdrawn by the Government during the first trial or dismissed by the Court on Motion for Judgment of Acquittal.

The jury verdicts of guilty on some counts and not guilty on others were completely inconsistent.

Reason for Granting Certiorari

WHEN BOTH THE GOVERNMENT AND THE DEFENDANTS AGREE THAT PREJUDICIAL PRETRIAL PUBLICITY, PREJUDICIAL EVIDENCE AND THE COMPLEXITY OF THE CASE REQUIRE TRIAL WITHOUT A JURY, THE TRIAL JUDGE CANNOT ARBITRARILY DENY A JOINT MOTION FOR BENCH TRIAL AND REQUIRE THE PARTIES TO UNDERGO TRIAL BY JURY.

Prior to both the first and second trials, the Defendants filed a joint motion for a bench trial in which the Government concurred. The reasons why both the Government and the Defendants requested trial by judge were both compelling and clear.

Prior to the first trial, there was enormous prejudicial publicity involving both the Government's investigation into vote fraud and the Defendant, Bob Clapps. In September of 1982, Clapps was convicted after a two-week trial in State Court of bribery, conspiracy and violation of the Public Officials Ethics Act. That trial received considerable attention in both the electronic and printed news media. Between the time of the State trial and Clapps' indictment in this case in November of 1982, there were daily newspaper articles concerning this Defendant. Publicity intensified after the Federal indictment through the first trial in February of 1983 and continued to the commencement of the second trial in April of 1983. During the jury voir dire for the second trial, 24 jurors acknowledged having been exposed to pretrial publicity about the case.

Clapps' prior State convictions provided the most compelling reason for avoiding trial by jury. Clapps's testimony was essential to the defense. The Court had ruled prior to trial that if he testified, he could be impeached by his prior State convictions

for bribery, conspiracy and violation of the Public Officials Ethics Act. Although the prior convictions could only be considered for the purpose of impeachment, the Defendants were cognizant of the likelihood that the jury would consider those prior convictions as evidence of the Defendant's propensity for crime, thus destroying any presumption of innocence. *Government of Virgin Islands* v. *Toto*, 529 F. 2d 278 (Cir. 3, 1976); *U.S.* v. *Martinez*, 555 F. 2d 1273 (Cir. 5, 1977).

In addition to the foregoing, the Defendants requested a bench trial because this was not a simple case for a jury to try. The case involved 2 Defendants and 29 counts of mail fraud. The jury was required to apply both State law concerning absentee ballots and Federal law concerning conspiracy and mail fraud. There were over 100 exhibits to be introduced into evidence and a number of Government witnesses were aged and both physically and mentally infirm.

All of the fears expressed by both the Government and the Defendants concerning trial by jury were proven to be justified. In the first trial, the jury was unable to reach a verdict on any of the counts. In the second trial, at the conclusion of the testimony, one juror asked to be excused because the case was "too complicated" for her to decide. The best evidence of the jury's inability to decide the case was the completely inconsistent verdicts rendered after the second trial. The jury split verdicts on certain counts when the evidence presented on each was virtually identical.

The jury's reaction to certain Government evidence was exactly as predicted by the Defendants in their motion for a bench trial. A number of Government witnesses were residents of a local rest home. Immediately after these aged and infirm witnesses testified, one juror was heard to comment "it's a shame what they are doing to these old people".

After Clapps's prior convictions were introduced into evidence, and prior to the Court's instruction limiting considera-

tion of those convictions to the issue of credibility, one juror complained to the Court that a number of his fellow jurors began discussing the case during trial and specifically commented on Clapps' prior convictions and the fact that he was a "three-time loser" and that he was "gone". The discussions as related by the complaining juror clearly indicated that the jury had begun discussing the case prior to the conclusion of evidence, had reached a premature conclusion as to guilt and had improperly considered Clapps's prior convictions as substantive evidence of guilt.

Although the potential prejudice inherent in a jury trial in this case was clear from the outset and even more apparent after the conclusion of the first trial, the trial judge, without explanation, persisted in his refusal to allow the parties to have trial by judge.

The Defendant believes that this case presents a novel and important issue for determination. This Court has never had an opportunity to review a case concerning a Defendant's right to a bench trial when both the Government and the Defendant have agreed to waive trial by jury. In *Singer* v. *U.S.*, 380 U.S. 24 (1965), relied on both by the District Court and by the Court of Appeals, the Defendant was denied a bench trial because the Government did not consent to have the case tried without a jury. However, even under those circumstances, the Supreme Court held that a nonjury trial may be required when the circumstances of the case are so compelling that impartial trial by jury is impossible or unlikely.

The *Singer* standard should not be applied to a case where the Government has consented to a bench trial. Under our system of justice, the Government has an adversarial interest in whether or not the case should be tried by a jury. The Court has no such interest and when both sides of the controversy agree that justice can best be served by a bench trial the Trial Court should not be permitted to arbitrarily require the parties to undergo trial by jury.

Rules 23(a) of the Federal Rules of Criminal Procedure provides:

> "Cases required to be tried by jury shall be so tried unless the Defendant waives a jury trial in writing with the approval of the Court and the consent of the Government".

In an adversary system, when the Government and the Defendant agree to a bench trial, under this Rule, the "approval" of the Court should be limited to a determination of whether there is a knowing and intelligent waiver of jury trial by the Defendant. Certainly, when both parties agree to a bench trial and the potential prejudice from a jury trial is apparent, the trial judge should not be permitted to require trial by jury absent a specific explanation on the record of compelling reasons requiring a jury trial. Here, there was no such explanation and certainly there were no compelling reasons to require a jury trial.[3]

Because the District Court refused to grant the motion for a bench trial, the parties were required to try this case twice. Ultimately, the case was submitted to a jury exposed to extensive pretrial publicity and tainted by the improper consideration of the Defendant's prior conviction and sympathy evoked by aged and infirm Government witnesses .

As evidenced by the hung jury in the first trial, the juror, who complained that the case was too complicated to decide and the inconsistent jury verdicts, the Defendant's fate was decided by a jury unable to understand and rationally decide the issues before it.

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[3]In deciding post verdict motions, the trial judge did state that the case involved issues of credibility best left to a jury. Most cases which are presented for trial involve issues of credibility and the trial judge never explained why, in this case, he could not resolve those issues. This rather vague remark should not be considered sufficient explanation for ignoring the prejudices inherent in a jury trial in this case.

Conclusion

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-3421

UNITED STATES OF AMERICA

against

BOB A. CLAPPS,

Appellant,

No. 83-3434

UNITED STATES OF AMERICA

against

ROBERT T. POWELL,

Appellant.

Appeal from the United States
District Court for the Middle
District of Pennsylvania

(D.C. Crim. Nos. 82-00172-01 and 82-00172-02)

Submitted Under Third Circuit Rule 12(6)
April 3, 1984

Before: GIBBONS, SLOVITER, *Circuit Judges,*
and BISSELL, *District Judge**

(Filed April 19, 1984)

*Hon. John W. Bissell, United States District Court for the District of New Jersey, sitting by designation.

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Opinion of the Court

SLOVITER, *Circuit Judge.*

Bob A. Clapps and Robert T. Powell were convicted of conspiracy and substantive charges of mail fraud in violation of 18 U.S.C. §1341 through the fraudulent procurement and marking of absentee ballots in connection with two primary elections and a general election. The defendants' first trial ended in a deadlocked jury and a mistrial was declared. At the retrial, the jury found Clapps guilty on thirteen counts of mail fraud and one count of conspiracy, and Powell guilty on five counts of mail fraud and one count of conspiracy. On appeal, they allege that the district court abused its discretion in denying their motions for a non-jury trial, for a mistrial due to alleged juror misconduct, and for judgment of acquittal due to lack of sufficient evi-

dence. Clapps also argues that the mail fraud statute does not encompass the conduct in which defendants engaged.

I.

Sufficiency of the Evidence

We can readily dispose of the contention that there was insufficient evidence to sustain the convictions. In reviewing a claim of insufficiency of the evidence after a guilty verdict, a court must view the evidence and the inferences logically deducible therefrom in the light most favorable to the government. *See, e.g., United States* v. *United States Gypsum Co.*, 600 F.2d 414, 416 (3d Cir.), *cert. denied*, 444 U.S. 884 (1979).

There was ample evidence at trial from which the jury could have found that Clapps, the Democratic Chairman of the 120th Legislative District of Luzerne County, Pennsylvania, initiated a scheme with the aid of Powell and two other co-conspirators, Robert Outeda and George Stoss, to fraudulently obtain absentee ballots and send them to the Election Bureau. Pursuant to this scheme, before the May 15, 1979 primary election. Outeda obtained the signatures of 10 to 15 residents of the Hoskins Rest Home on applications for absentee ballots, gathered the ballots when they arrived at the Home, and turned them over to Clapps. Then, at Clapps' direction, Outeda obtained the voters' signatures on the declaration which appears on the envelope in which each completed absentee ballot is mailed. Outeda returned the envelopes to Clapps, and they were then sent to the Election Bureau. The evidence showed that the voters only signed the declarations and never saw the ballots.

Outeda also testified that before the November 6, 1979 general election, Clapps directed him to obtain signatures of several Hoskins Home residents on applications. As the district court

stated, Outeda delivered these applications to Powell at Clapps' garage "who directed Outeda to sign the applications of [three voters] attesting to the fact that they were unable to sign because of illness or physical disability." App. at 216a. Powell notarized all five applications. The Bureau sent five absentee ballots addressed to those voters, which were returned to the Bureau by mail with signatures on the envelope's declaration. At trial, all five voters testified that they never saw, marked, or mailed the ballots.

George Stoss, an indicted co-conspirator, testified that prior to the May 19, 1981 primary election, he procured applications from two residents of a low-income housing development pursuant to Clapps' direction. After the Bureau mailed ballots, Clapps instructed Stoss to go to the two voters and "make sure they vote for these people, that was on the [party] ticket." Stoss testified that he followed these directions and that Clapps reviewed the two marked ballots, which were later sent to the Bureau. Both voters were in fact capable of getting to the polls on Election Day and thus were ineligible to vote by absentee ballot.

There was testimony that none of the eight voters named in the mail fraud counts requested the documents at issue. Outeda gave extensive testimony to receiving applications and instructions from Clapps to obtain signatures, and to delivering applications and ballots to both defendants. Stoss testified that Clapps directed him to obtain marked ballots and then reviewed the ballots. Five of the applications were notarized by Powell although none of the voters appeared before him. Finally, there was expert testimony that both defendants' fingerprints were found on the voting materials.

The jury could have reasonable inferred from this evidence that the appellants mailed fraudulently obtained applications and

ballots. Each participant in the scheme is responsible for each use of the mails in furtherance of the scheme regardless of whether he agreed to or even knew of a specific mailing. *United States* v. *Nance*, 502 F.2d 615, 619 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975). The evidence outlined above, supported by additional evidence, also formed the basis for the conspiracy counts.[1] The evidence and the inferences deduced therefrom, when viewed in the light most favorable to the government, are sufficient to sustain the convictions for all counts of mail fraud and conspiracy.

II.

Right to Bench Trial

We turn next to appellants' contention that the court erred in refusing to grant them a bench trial. Appellants filed a joint pretrial motion seeking to waive their rights to a jury trial pursuant to Fed. R. Crim. P. 23(a). Although the government concurred in the motion, the district court refused to grant it and the matter was tried before a jury.

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[1]In addition to the evidence set forth above, the conspiracy counts were also supported by admissions in body tape recordings made by Stoss of conversations with Clapps and Powell. In a taped conversation of April 22, 1982 between Stoss and Clapps, Clapps advised Stoss how to handle the postal inspectors investigating the case. App. at 51a-53a. In the same conversation, Clapps stated that "the applications are mailed in" but suggested to Stoss that he tell the inspector that the voters mailed them. App. at 56a. In a taped conversation of May 6, 1982 between Stoss and Powell, Powell made comments such as "we have to stick together"; "who wants to rat, you know"; "if everybody plays it cool, I don't think there's gonna be no problem at all"; "don't tell them nothing"; and "they're figuring as soon as they can break somebody . . . you know, then they'll bring everybody down, you know. . . . But who wants to be like that. . . ." App. at 218.

Fed. R. Crim. P. 23(a) states:

> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Government.

Appellants concede they do not have an absolute right to a non-jury trial, Fed. R. Crim. P. 23(a), and indeed that is the governing rule in light of *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965), and *Patton* v. *United States*, 281 U.S. 276, 312-13 (1930). *See also United States* v. *Clausell*, 389 F.2d 34, 35 (2d Cir. 1968). In *Singer*, also a mail fraud prosecution, the Supreme Court rejected the appellant's contention that he had an unrestricted right to waive a jury trial. Chief Justice Warren wrote: "We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him." 380 U.S. at 36.

The district court stated that it denied appellant's post-trial motion because it anticipated the need for credibility evaluations that were "best left to a jury of twelve." App. at 225a. Appellants contend that the district court abused its discretion because the court acted under the erroneous premise that a jury trial would not result in an unfair trial. Specifically, appellants suggest that pretrial publicity, the prior conviction of Clapps on charges of bribery, conspiracy, and a violation of the Public Officials Ethics Act, the complexity of the issues and the alleged prejudicial nature of the government's evidence were such that no jury would be impartial.

The district court ruled, and we agree, that "[t]he reasons advanced by the defendants are plainly insufficient to show an abuse of discretion by the court in requiring that the case be decided

by a jury." App. at 225a. As the *Singer* Court acknowledged, there might sometimes exist conditions under which a jury trial could not be impartial. 380 U.S. at 37-38. But such conditions do not exist here.

The legal issues were simplified at trial by the parties' stipulation of law regarding the Pennsylvania Election Code. Clapps' prior convictions were admissible under Fed. R. Evid. 609(a) and the jury was clearly entitled to view the government's witnesses, some of whom were elderly and infirm, because the indictment charged that the scheme was to take advantage of such people. For the foregoing reasons, we find the district court did not abuse its discretion in denying appellants' motion for a non-jury trial.

III.

Motion for Mistrial

Appellants contend that the district court abused its discretion in failing to grant their motion for mistrial due to alleged juror misconduct. After all the evidence had been received but prior to the closing arguments, one of the jurors reported to the court that some jurors had been discussing the case.[2] Upon the appellants' motion for mistrial, the court conducted a voir dire examination to correct any potential prejudice. As a result of the voir dire examination, the court removed the two jurors who had been identified as speaking and substituted alternates. See

[2]The juror reported that one juror said "[w]ell he's a three time loser" and "they never should have put him on the stand," and one of the alternate jurors responded, "Yeah, he's gone"; the juror who had originally spoken purportedly said, "[H]e has to be guilty of some of them"; and the same alternate rebuked him, reminding him that "the judge told you not to discuss the case." According to the juror who reported the incident, another juror said, "Mr. Clapps, guilty."

note 2 *supra*. The alternate juror who participated in the conversation was not removed as her services were not needed. A fourth juror was removed prior to jury deliberation because she stated that she was confused by the case and did not wish to deliberate. The remaining jurors stated that nothing occurred which would influence their verdict or their impartiality. Despite the removal of the two jurors whose views were tainted, appellants continue to allege that the jury as a whole was tainted and biased.

Appellants have the burden of showing that there is a "likelihood of actual prejudice." *United States* v. *Pantone*, 609 F.2d 675, 679 (3d Cir. 1979). Appellants are unable to document such prejudice. Their claim is based solely on the juror's statement that up to six jurors heard the impermissible comments. However, this was never proved by appellants.

In *United States* v. *Pantone*, where a corrective voir dire satisfied the trial court that nothing had occurred to influence a verdict or the jury's impartiality, we stated, "The trial court is obviously in a better position to observe the impact of premature jury discussions of guilt, and to make a considered judgment as to the effectiveness of a cautionary instruction." 609 F. 2d at 679. In this case, the court conducted a corrective voir dire and was "convinced that there was no prejudicial juror misconduct and, further, that defendants received a fair trial." App. at 224a. Under these circumstances, we are satisfied that there was no abuse of discretion in denying the motion for a new trial.

IV.

Scope of Section 1341

Appellant Clapps contends that the mail fraud statute, 18 U.S.C. § 1341, does not proscribe a conspiracy to influence the outcome of an election. The relevant provision prohibits the use

of the mails for executing "any scheme or artifice to defraud, or for obtaining money or property by . . . false . . . pretenses"[3] (emphasis added). We concluded in *United States* v. *Frankel*, 721 F.2d 917, 921 (3d Cir. 1983), that the "scheme or artifice to defraud" clause is to be read independently of the "obtaining money or property by . . . false . . . pretenses" clause.

Clapps argues that Congress did not intend in section 1341 to interfere with the conduct of state elections. He relies on *United States* v. *Gradwell*, 243 U.S. 476 (1917), in which the Supreme Court held that a conspiracy to "injure and oppress" candidates in a state primary nominating election did not fall within a federal statute proscribing a "conspiracy to defraud the United States." The statute at issue in *Gradwell* was construed by the Court as designed for prosecution of frauds against the operation of the government, such as upon the revenue. In contrast, the mail fraud statute is considerably more comprehensive.

In considering the scope of the "scheme or artifice to defraud" clause of section 1341, we stated in *United States* v. *Pearlstein*, 576 F.2d 531, 534 (3d Cir. 1978), that the statute is "quite broad" and "generally proscribes 'any scheme or artifice to defraud' which in some way involves the use of the postal system." Subsequently, in *United States* v. *Boffa*, 688 F.2d 919 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 1272 (1983), involving a scheme to switch labor leasing contracts from one corporation to another, we reviewed the following decisions of other courts holding that

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[3]In pertinent part the statute reads:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . [and] for the purpose of executing such scheme . . . places in any post office . . . any matter . . . to be sent or delivered by the Postal Service . . . shall be fined . . . or imprisoned . . . or both.

18 U.S.C. § 1341 (1982).

section 1341 encompasses schemes that deprive persons of intangible rights or interests:

> *See United States* v. *Bronston*, 658 F.2d 920, 927 (2d Cir. 1981) (client's right to "undivided loyalty" of attorney); *United States* v. *Van Barta*, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998, 101 S. Ct. 1703, 68 L.Ed.2d 199 (1981) (employer's right to the honest and faithful service of employees); *United States* v. *Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928, 100 S. Ct. 3026, 65 L.Ed.2d 1122 (1980) (same); *United States* v. *Condolon*, 600 F.2d 7 (4th Cir. 1979) ("time, effort and expectations"); *United States* v. *Louderman*, 576 F.2d 1383 (7th Cir.), *cert. denied*, 439 U.S. 896, 99 S. Ct. 257, 58 L.Ed.2d 243 (1978) (privacy rights); [*United States* v.] *States*, 488 F.2d [761,] 765 [(8th Cir. 1973)] ("certain intangible political rights"); *Shushan* v. *United States*, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574, 61 S. Ct. 1085, 85 L.Ed. 1531 (1941) (public's right to a public official's honest, faithful, and disinterested services); *United States* v. *Fineman*, 434 F.Supp. 189, 195 (E.D. Pa. 1977) (same).

688 F.2d at 925-26. We found the reasoning of those courts persuasive and held, *inter alia*, that a scheme to defraud employees "of the loyal, faithful, and honest services of their union official alleges a crime within the scope of the mail fraud statute." 688 F.2d at 931.

We see no reason why the same principles do not justify applying the mail fraud statute to a scheme to deprive an electoral body of its political rights to fair elections free from dilution from the intentional casting and tabulation of false, fictitious or spurious ballots. In so reasoning, we align ourselves with the Eighth Circuit, which concluded in *United States* v. *States*, 488 F.2d

761, 764 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974), that a vote fraud scheme comes within section 1341. That court rejected the same argument that appellant Clapps makes with respect to congressional interference with state elections:

> The appellants' argument misinterprets the purpose of the mail fraud legislation. The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails. . . . The purpose of 18 U.S.C. §1341 is to prevent the Postal Service from being used to carry out fraudulent schemes, regardless of what is the exact nature of the scheme and regardless of whether it happens to be forbidden by state law.

Id. at 767 (citations omitted).

The appellant has presented no persuasive reason why the mail fraud statute should not apply to this case. We conclude that the indictment alleged an offense under 18 U.S.C. § 1341 and that there was sufficient evidence to support the conviction of all counts thereof.

Accordingly, we will affirm the judgment of the district court.
A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Order Denying Petition for Re-Hearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 83-3421

UNITED STATES OF AMERICA

against

BOB A. CLAPPS,

Appellant.

SUR PETITION FOR REHEARING

Present: GIBBONS and SLOVITER, *Circuit Judges,* and BISSELL, *District Judge**

The petition for rehearing filed by Appellant, Bob A. Clapps, in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

Delores K. Sloviter

Circuit Judge

Dated: May 10, 1984

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*Hon. John W. Bissell, United States District Court for the District of New Jersey, sitting by designation.

Order Granting Stay of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 83-3421

UNITED STATES OF AMERICA

against

CLAPPS, BOB A., Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 16, 1984.

Delores K. Sloviter
Circuit Judge

Dated: May 22, 1984

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 82-3421

U.S. OF AMERICA,

Appellee,

against

BOB A. CLAPPS,

Appellant.

Appeal from the United States District Court
For the Middle District of Pennsylvania — Scranton
D.C. Docket No. 82-00172-01
Before Honorable William J. Nealon

Submitted Under Third Circuit Rule 12(6) April 3, 1984
Before GIBBONS, SLOVITER, *Circuit Judges,* and BISSELL, *District Judge**

JUDGMENT ORDER

After consideration of all contentions raised by Appellant, it is

ADJUDGED and ORDERED that the judgment of the District Court be and is hereby affirmed.

By the Court,
DELORES K. SLOVITER
Circuit Judge

Attest:
SALLY MRVOS
Clerk

Dated: April 19, 1984

*Honorable John W. Bissell, United States District Court for the District of New Jersey, sitting by designation.

Memorandum and Order of the District Court

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

For the
UNITED STATES OF AMERICA

against

BOB A. CLAPPS
ROBERT T. POWELL
No. 82-00172-01-02 Criminal

Memorandum and Order

In this criminal case, defendants, Bob A. Clapps (Clapps) and Robert T. Powell (Powell), are charged with using the United States mails to carry out a scheme of election fraud in which they would obtain and mail absentee ballot material on behalf of registered electors who were not eligible under the Pennsylvania Election Code to vote by absentee ballot. Clapps was convicted by a jury on one count of conspiracy and thirteen substantive counts of mail fraud.[1] He was acquitted on five other

[1] 18 U.S.C. §1341, the Mail Fraud Statute, in pertinent part provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whether to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

substantive counts of mail fraud. Powell was also convicted on one count of conspiracy and five substantive counts of mail fraud.[2] The jury acquitted him on five other substantive mail fraud counts. Both defendants have filed motions for judgments of acquittal on the grounds that (1) the evidence was legally insufficient to sustain the jury's verdicts; (2) the Mail Fraud Statute is inapplicable to the type of absentee ballot fraud charged in this case; and (3) governmental misconduct before the Grand Jury warranted dismissal of the indictment. Defendants also moved for a new trial because the court allegedly erred in (a) allowing into evidence prior convictions of defendant Clapps on State charges; (b) not declaring a mistrial upon learning that certain jurors had discussed the case among themselves prior to beginning deliberations; and (c) not allowing the case to be tried by the judge instead of a jury. The motions will be denied.

The background of this case reveals a scheme initiated by Clapps, the Democratic Chairman of the 120th Legislative District of Luzerne County, and aided and abetted by Powell and two other coconspirators, Robert Outeda and George Stoss, to procure absentee ballots from residents of the Hoskins Rest Home and the Schooley Avenue low income housing project by falsely representing that these residents would be unable to go to the polling place on the day of election because of illness or absence from the county. In fact, the residents were not absent from the county and were not too ill to vote in person. The modus operandi was to mark the elector's absentee ballot or otherwise to see to it that the ballot was marked for candidates allegedly favorable to the members of the conspiracy and to mail these fraudulent absentee ballot materials to the Luzerne County Board of Elections through the United States Mails. The ultimate purpose of the scheme was to defraud the Luzerne County Board of Elections and the voters of the 120th Legisla-

[2]Defendant Powell was indicted as an aider and abettor. 18 U.S.C. §2.

tive District by influencing the election results and thereby depriving them of the right to a fair and impartial election.

Motion for Judgment of Acquittal

In considering a motion for judgment of acquittal after a jury verdict of guilty, the court must view the evidence and the inferences logically deducible therefrom in the light most favorable to the government. *United States* v. *United States Gypsum Co.*, 600 F.2d 414 (4d Cir. 1979). Moreover, it is not necessary in a mail fraud prosecution that the use of the mails by the participants themselves be contemplated, or that a particular defendant did the actual mailing. Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used. *Pereira* v. *United States*, 347 U.S. 1, 8, 9 (1954); *United States* v. *Boscia*, 573 F.2d 827, 834 (3d Cir. 1978).

Viewing the evidence in the light most favorable to the government, the following factual picture emerges.

Robert Outeda, who resided with his grandmother in a trailer adjoining the Hoskins Rest Home, a State licensed boarding home for the elderly (home), for a number of years had assisted Jerry Clapps, father of defendant Bob A. Clapps, in obtaining Requests for Absentee Ballot Applications (Requests), Applications for Absentee Ballots (Applications), and the absentee Ballots (Ballots) themselves from residents of the Home. Under the law of Pennsylvania prior to 1980, a Request by an eligible voter for an Application had to be submitted to the Luzerne County Election Board (Board) and an Application would be mailed by the Board to the voter. A voter could vote by

absentee ballot if he/she was going to be unavoidably absent from the County on election day because of duties, occupation or business, or could not go to the polling place because of illness or physical disability.

If the voter expected to be absent from the County, he/she had to sign the Application attesting to that fact. If the voter was unable to get to the polling place because of illness or physical disability, the voter had to describe the nature of the illness and sign the section on the Application relating to such disability. If ill or disabled, the voter's attending physician had to sign and verify this condition. If the voter did not have an attending physician, the signature of a registered elector not related by blood or marriage was sufficient. Upon receipt of the Application, the Board would mail (1) a Ballot, (2) a small envelope in which the executed Ballot would be placed and sealed, and (3) a larger envelope in which the smaller sealed envelope would be placed. The larger envelope containing the return address of the voter, a declaration signed by the voter stating that he/she would be unable to appear at the polling place, and a statement that the Ballot was marked in secret, was to be mailed back to the Board by the voter with its enclosures.

I.

May 15, 1979, Primary Election Ballots

In the early spring of 1979, Outeda obtained the signatures of certain residents of the Hoskins Rest Home on Requests and Applications for Jerry Clapps. The conspiracy, and substantive counts that are charged in this indictment didn't originate until later in April 1979, when, according to Outeda, defendant Clapps, son of Jerry Clapps, came to Outeda's trailer with Ballots and envelopes which he had picked up at the Hoskins Rest

Home. Outeda testified that Clapps would spread the Ballots out on the table and turn over the envelopes to Outeda, one at a time, and have him go into the Home and obtain the signature of the voter on the declaration contained on the larger envelope which was to be mailed to the Board and attested to the inability of the voter to go to the polling place. After obtaining the voter's signature, Outeda would return the envelope to Clapps. The voter would never see the actual Ballot but Clapps would take possession of it, together with the unsealed envelope, and depart from the trailer. The envelopes subsequently were received through the mail by the Board on May 2, 1979, and were postmarked May 1, 1979. Clapps was indicted on three counts relating to the May 15, 1979, primary for having defrauded the Board and the voters of the 120th Legislative District in Luzerne County by mailing fraudulent absentee ballots of certain residents of the Home to the Board in violation of the United States Mail Statute, 18 U.S.C. §1341, *viz.*, Count I — Irene Nedwick, Count XIV — John Parog, and Count XVII — Mary Perfetto. He was acquitted on Count I (Nedwick) and on Count XIV (Parog), but was found guilty on Count XVII (Perfetto). Mary Perfetto is unable to read or write. She denied requesting an absentee ballot, marking it, or mailing it to the Board. Outeda testified that he signed his name on the ballot envelope allegedly witnessing Mary Perfetto's Absentee Elector's Declaration and on the Declaration of Person Rendering Assistance. He stated that he turned this material over to Clapps. According to the postmark, the Ballot was mailed in Wilkes-Barre on May 1, 1979, and received by the Board May 2, 1979. This evidence was sufficient to warrant a finding that Clapps had obtained and mailed this Ballot in furtherance of the scheme. Moreover, as previously noted, it is not necessary to prove that a defendant actually mailed the Ballot so long as use of the mails by someone was reasonably foreseeable in order to carry out the scheme. *See also United States* v. *Toney*, 598 F.2d 1349 (5th Cir. 1979). Therefore, the offense was complete: a scheme to defraud the Board

and the voters of the 120th Legislative District was executed by using the United States mails to cast a fraudulent absentee ballot.

November 6, 1979, General Election Applications

Outeda testified that sometime in September 1979, Clapps gave him a group of Requests for certain residents of the Home, viz., Irene Nedwick, Bertha Saba, Anna Costello, John Parog and Mary Perfetto. He obtained the signatures of Nedwick, Saba, Costello and Parog. Perfetto signed the Request with her mark which Outeda executed as a witness. These Requests were all returned to Clapps and were received by the Board through the mail. Later on in October 1979, Clapps delivered Applications for these persons to Outeda with their individual names typed on each Application and asked Outeda to procure their signatures. Outeda complied and acquired all signatures except that of Costello, who refused to sign, and he attempted to deliver them to a garage operated by Clapps, but Clapps was not available. Defendant Powell was present, however, and took possession of the Applications after instructing Outeda to affix his signature to the Applications of Costello, Parog, and Perfetto, indicating that they were unable to sign because of illness or physical disability. Outeda complied and observed Powell place the Applications in a brief case in which other Applications were visible. The Nedwick and Saba Applications were mailed on October 16, 1979, and received by the Board on October 17, 1979. The Costello,[3] Parog, and Perfetto Applications, with Statements of Electors Requesting Assistance,[4] were also mailed to the Board on October 16, 1979, and received October 17, 1979. The Applications and Statements of Electors Request-

[3]Clapps' fingerprint was found on the Costello Application.

[4]The Statements of Electors Requesting Assistance, which were mailed in the same envelope with the Applications, contained the signature and fingerprints of Powell.

ing Assistance contained false information concerning these voters—Nedwick was described as having "arthritis and being bedridden"; Saba as having an "asthma condition"; Costello as a victim of a "stroke, arthritis and partial (sic) blind"; Parog as having "arthritis, asthma, bad eyes"; and Perfetto as "bad eyes, arthritis, partial stroke." All these witnesses denied having such disabilities. Moreover, Outeda stated that he never saw the Costello, Parog and Perfetto Statements of Electors Requesting Assistance and neither did these three electors. The jury found Clapps and Powell guilty on all of these counts, *viz.*, Count II (Nedwick); Count IV (Saba); Count VI (Costello); Count XV (Parog); and Count XVIII (Perfetto).[5] Once again, the evidence established that the mails were used to transmit false applications in order to defraud the Board and the voters of the 120th Legislative District.

November 6, 1979, General Election Ballots

As a result of the aforementioned Applications which were received by the Board on October 17, 1979, Ballots were mailed to Nedwick, Saba, Costello, Parog and Perfetto. Ballots on behalf of these electors, postmarked October 22, 1979, were received through the mails by the Board on October 23, 1979. All five electors testified that they never saw, marked or mailed these ballots. Obviously, someone fraudulently obtained and mailed them. Clapps was found guilty on all the counts relating to the mailing of these Ballots, *viz.*, Count III (Nedwick); Count V (Saba); Count VII (Costello); Count XVI (Parog); and Count XIX (Perfetto). Powell was acquitted of these charges. Although there was no direct evidence that Clapps mailed the absentee ballots, such action could be inferred from the evidence

[5]Both defendants were acquitted on Count XII, the Application of Ann Hass, but this presented a different factual situation in which the Rest Home and Outeda were not involved.

in the case that he used the mails for such purposes on other occasions and actually initiated this absentee voting activity by furnishing typed Applications for these Ballots to Outeda in October 1979. The scheme would have contemplated that Ballots would be sent to the residents of the Home by the Board and that the Ballots would then be mailed back to the Board. Again, where one does an act with knowledge that use of the mails can reasonably be foreseen, then he causes the mails to be used. If the Applications, with which Clapps was clearly identified by Outeda, had not been obtained and submitted to the Board, these Ballots would never have been mailed to the electors by, and ultimately returned to, the Board. Consequently, by his action Clapps caused the United States Postal Service to deliver fraudulent absentee balloting materials to ineligible electors and to the Board as charged in the indictment.

May 19, 1981, Primary Election Ballots

George Stoss, by his own admission, participated in the scheme commencing in the spring of 1981. He testified that, at Clapps' request, he procured Applications from Charles Puskavage and Evelyn Puskavage, his wife, who were residents of a low income housing development at 500 Schooley Avenue in Exeter. At a later date, according to Stoss, he received a telephone call from Clapps who informed him that the Ballots were in the mail and asked him to come to Clapps' garage where he gave Stoss the "party ticket" and instructed him to go to the Puskavage home and "make sure they vote for these people." When Stoss arrived at the Puskavage home, the Ballots, as Clapps predicted, were in the mailbox. Mr. Puskavage retrieved the Ballots, opened the envelope, and asked Stoss "who he should vote for." Stoss advised Puskavage as to the proper candidates and Puskavage marked the Ballot. Stoss admitted that he marked Mrs. Puskavage's Ballot because she was resting on a couch. After the Bal-

lots were marked, Stoss took them to Clapps in the unsealed envelopes. According to Stoss, Clapps opened the envelopes and inspected the Ballots, remarking as he did, "good, good, good." Clapps took possession of these Ballots and they were ultimately received by the Board on May 7, 1981, bearing a postmark of May 6, 1981. Neither Mr. nor Mrs. Puskavage was eligible to vote by Absentee Ballot as they were in the County on the day of election and would have been able to get to the polling place. Consequently, there was sufficient evidence to support the jury's guilty verdict against Clapps of having mailed, or caused to be mailed, the Ballots of Charles Puskavage (Count IX) and Evelyn Puskavage (Count XI) to the Board on or about May 6, 1981.

Conspiracy

The conspiracy, according to the government, began on or about March 1, 1979. The first evidence of the scheme occurred in April 1979, when Clapps visited Outeda in his trailer adjoining the Hoskins Rest Home. At that time Clapps had Ballots and return envelopes in his possession for the May 15, 1979, Primary Election. Outeda was instructed to go to the residents and have their signatures affixed on the declaration appearing on the return envelope. The jury found, on the substantive count, that this procedure was followed as to Mary Perfetto because a guilty verdict was returned against Clapps. The scheme continued into the General Election of November 6, 1979, and Outeda testified to having obtained the signatures of Nedwick, Saba, Costello, Parog and Perfetto, on the Requests for Applications at Clapps' request. Later he procured the signatures of Nedwick, Saba, Parog, and Perfetto (Costello refused to sign) on the Applications of Electors, once more at Clapps' request. He delivered these Applications to Powell at Clapps' garage who directed Outeda to sign the Applications of Costello, Parog, and Perfetto attesting to the fact that they were unable to sign because of

illness or physical disability. Powell deposited these Applications in a briefcase. All of these Applications, and Statements of Electors Requesting Assistance notarized by Powell, were received by the Election Board through the mail and both defendants were convicted on all of these substantive counts, which were also alleged as overt acts. Of particular importance is the fact that Outeda testified that he delivered the Costello Application to Powell but did not turn over, and never saw, the Statement of Electors Requesting Assistance. Both the Application and the Statement were enclosed in the same envelope which was mailed to the Board. Clapps' fingerprints appeared on the Application and Powell's were on the Statement. This corroborated Outeda' testimony that he received this Application from Clapps and that he turned it over to Powell inasmuch as Powell's fingerprint ended up on the Statement that accompanied the Application when it was received by the Board. It showed, further, a relationship between Clapps and Powell. Powell's fingerprints also appeared on the Statements of Parog and Perfetto.

George Stoss entered the conspiracy in the spring of 1981. There is no need to repeat his testimony except to point out that he admitted joining with Clapps in obtaining and mailing the Puskavage Ballots. Clapps provided the material, advised Stoss when the Ballots would arrive at the Puskavage residence, instructed Stoss as to how the Ballots were to be executed, and took possession and reviewed the Ballots prior to mailing.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose where one or more of the persons involved commits an overt act to effect the object of the conspiracy. In this case, two of the conspirators testified for the government. Outeda linked both Clapps and Powell in the plan and Stoss implicated Clapps. While the activities of some may have been performed without the knowledge of others, it is not necessary for all conspirators to know

all the details or all the participants. *United States* v. *Boscia*, 573 F.2d 827, 834 (3d Cir. 1978).

An additional thread in the fabric of proof showing knowledge and criminal intent was the body tape recordings made by Stoss of conversations with Clapps and Powell. Clapps in his tape-recorded conversation on April 22, 1982, advised Stoss as to what to tell the Postal Inspectors who were investigating the case and, further, demonstrated his knowledge of the anticipated use of the mails by stating "the applications are mailed in" and by suggesting that Stoss tell the Inspectors that "the people mailed them." In a subsequent taped conversation with Stoss on May 5, 1982, Clapps stated ". . . Sure I had ballots . . . and I marked all the ballots . . ." which can be fairly construed as showing knowledge of, and intent to violate, the Pennsylvania Absentee Ballot laws. He remarked also that the Inspectors were only checking out ". . . absentees going through the mail . . . and a ballot you got to mail through the mail." Finally, Clapps advised that Stoss shouldn't mention the names of others because ". . . that's a rotten . . . that's the worse thing you could do. . . ."

Powell, in his May 6, 1982, taped conversation with Stoss, made such comments as "we have to stick together"; "who wants to rat, you know"; "if everybody plays it cool, I don't think there's gonna be no problem at all"; "don't tell them [the Inspectors] nothing"; and "they're figuring as soon as they can break somebody . . . you know, then they'll bring everybody down, you know. . . . But who wants to be like that. . . ." All of these statements could have permissibly been found by the jury to show guilty knowledge of the conspiracy and criminal intent. Furthermore, it established another link between Clapps and Powell through Stoss.

As the hereinabove review of the evidence demonstrates, there was clearly sufficient evidence to support the jury's guilty verdicts.

II.

Defendants reassert the contention that the Mail Fraud Statute does not apply to the type of absentee ballot fraud charged in this case. This issue was raised and rejected prior to trial. In *United States* v. *Lewis,* 514 F. Supp. 169 (M.D. Pa. 1981), a similar case involving use of the mails in an absentee ballot fraud scheme, this court held that the Mail Fraud Statute was not confined to schemes involving money or other tangible property but also applied where the mails were used to deprive voters of their intangible right to a fair election. "The public's interest in unsullied elections is at least as important as the other non-monetary items" already recognized as being within the reach of the statute. *Id.,* at 176. The rationale was adopted that (a) the plain thrust of the language contained in 18 U.S.C. §1341 indicates that more than money and property are protected from fraudulent use of the mails; (b) the mail fraud statute is not to be enforced according to any technical standards, and (c) extensive judicial precedent has applied §1341 to intangible interests. Subsequently, in *United States* v. *Boffa,* 688 F.2d 919 (3d Cir. 1982), our Court of Appeals held that a scheme to deprive persons of intangible rights or interests was cognizable under §1341. The court reviewed a series of cases which had approved mail fraud prosecutions of such schemes, including *United States* v. *Lewis, supra,* and found "the reasoning employed by these courts persuasive, and thus recognize that a scheme to deprive persons of intangible rights or interest may be within the ambit of 18 U.S.C. §1341," *id.,* at 926. Consequently, we abide by our holding in *United States* v. *Lewis* and reject this argument by defendants.

III.

The charge of governmental misconduct merits little discussion. It concerns an admonition by government counsel to Outeda

following his appearance before the Grand Jury "not to discuss your testimony with anyone other than the investigators." To this warning was added the following: "(h)owever, we can't force you not to discuss your testimony with anyone, but we would suggest that you do not and that you use extreme discretion in who you talk to." Assuming that such a statement was improper, it was corrected long before trial. The matter was raised early at a pretrial conference and government counsel agreed to notify Outeda promptly that he had every right to discuss his testimony with defense counsel. Government counsel represented later to the court that this was done and that Outeda and defense counsel did meet although Outeda was unwilling to answer defense counsel's questions. Additionally, and most important, the court offered to bring Outeda before the court and instruct him that he could discuss the case with defense counsel. This offer was not accepted by defense counsel. Under these circumstances, full opportunity having been extended to defense counsel to confer with Outeda, defendant cannot be heard to complain at this late date that he was denied access to a key witness.

Motion for a New Trial

This motion asserts three errors by the court, *viz.*, (1) allowing into evidence prior convictions of State charges against Clapps for which post-verdict motions were pending in the State court; (2) not declaring a mistrial upon learning that certain jurors had discussed the case among themselves prior to beginning deliberations; and (3) not permitting the case to be tried by the judge instead of a jury.

IV.

Defendant Clapps was previously convicted in the Luzerne County Court of Common Pleas for violations of Pennsylvania

Public Officials Ethics Act, 65 Pa. Cons. Stat. Ann. §403 (Cum. Supp. 1982-1983) and for Bribery, 18 Pa. Cons. Stat. Ann. §4701(a). Post-trial motions were filed which had not been acted upon at time of trial in this case. Clapps argues that the court should not have allowed these convictions to be used to impeach his testimony. This matter was raised before trial by a motion *in limine* and I held that (a) the guilty verdicts were convictions within the meaning of Fed. R. Evid. 609; *United States* v. *Bianco*, 419 F. Supp. 507 (E.D.Pa. 1976), *aff'd mem.*, 547 F.2d 1164 (3d Cir. 1977); these offenses involved an element of *crimen falsi, i.e.*, deceit, and were admissible under Rule 609(a)(2), *Government of the Virgin Islands* v. *Toto*, 529 F.2d 278, 281 (3d Cir. 1978); and (c) even if Rule 609(a)(1) applied, the probative value of the convictions substantially outweighed its prejudicial effect to the defendant.

In the meantime, our Court of Appeals ruled in *United States* v. *Wong*, 703 F.2d 65 (3d Cir. 1983) that where a defendant was convicted of a crime involving dishonesty or false statement, then Rule 609(a)(2) applied and the conviction may be used without resort to the balancing test of whether its probative value substantially outweighed its prejudicial effect. This ruling, fortifies the position previously taken by this court. Clapps was a Councilman in Exeter Borough and Democratic Chairman of the One Hundred Twentieth Legislative District of Luzerne County when his state offenses occurred. His convictions involved his offering one Walter Placek continued employment for his wife, Barbara Placek, at the Valley Crest Home for the Aged, an institution operated by the Luzerne County Commissioners, in return for Placek's favorable vote as a Wyoming Area School Board member and his nonattendance at Wyoming Area School Board meetings. The Conference Report on Rule 609 stated that the phrase "dishonesty and false statement" would include an *"offense in the nature of crimen falsi, the commission of which involves some element of deceit,* untruthfulness, or fal-

sification bearing on the accused's propensity to testify truthfully." (emphasis added). Both of Clapps' convictions implicated dishonest conduct which defrauded and deceived the public of the right to honest and impartial administration of public affairs and, therefore, were properly admitted. *United States* v. *Williams,* 642 F.2d 136, 140 (5th Cir. 1981).

V.

Throughout the trial the court instructed the jury not to discuss the merits of the case until it had heard all the evidence, the closing arguments of counsel and the charge of the court. On the morning of April 8, 1983, after all evidence had been received but prior to counsels' closing arguments to the jury, a juror reported to the court that some jurors had been discussing the case. Specifically, that he heard one juror say "[w]ell, he's a three time loser" and "[t]hey never should have put him on the stand." When this statement was made there were five or six jurors in one section of the jury room and was "loud enough that people could hear," although he was not sure the others heard it. However, a female alternate juror allegedly responded "Yeah, he's gone." At a later time, the same male juror purportedly remarked that "[h]e has to be guilty on some of them" at which time the same female alternate juror rebuked him reminding that "the Judge told you not to discuss the case." He also identified a second male juror who he overheard say "Mr. Clapps, guilty." Upon further questioning, he said that the word "guilty" was uttered two minutes after Mr. Clapps' name was mentioned. Defendants moved for a mistrial which was denied. An individual *voir dire* of each juror was conducted, after which defendant Clapps moved that both male jurors be removed from the jury and this was granted even though they did not admit to making such statements. Defendant Powell requested only that the first male juror be removed. Two of the four alternate jurors replaced the two male jurors. The female alternate juror was

not reached and did not participate in the deliberations. The government moved, over defense objections, for the disqualification of the juror informant but this motion was denied. Each of the jurors who remained on the jury, with the exception of the informant, stated that he/she heard no comment concerning the evidence or the defendants and, as far as each knew, all jurors abided by the court's instructions that they not discuss the case until they began deliberating. All stated that they still had an open mind; that they could consider the evidence fairly and impartially; and that they could arrive at a fair and honest verdict. After questioning each juror along the lines mentioned in *United States* v. *Pantone,* 609 F.2d 675 (3d Cir. 1979), and gauging each response, I am completely satisfied that this was, in fact, a fair, honest, open-minded and impartial jury. *See United States* v. *Morrone,* 502 F. Supp. 983 (E.D. Pa. 1980), *aff'd mem.,* 672 F.2d 904, (3d Cir. 1981), *cert. denied* 455 U.S. 941 (1982). None of the deliberating jurors heard any remark that might have been prejudicial to these defendants and no showing of prejudice has been proffered. Moreover, defendants were acquitted by this jury of some of the counts in the indictment. Consequently, I am convinced that there was no prejudicial juror misconduct and, further, that defendants received a fair trial. *United States* v. *Klee,* 494 F. 2d 394 (9th Cir.), *cert. denied* 419 U.S. 835 (1974).

VI.

Defendants, with the concurrence of the government, filed a pretrial motion seeking to waive their right to a jury trial under Rule 23 of the Federal Rules of Criminal Procedure and to proceed to a nonjury trial before the court. The motion was denied. Defendants now assert that this denial was error requiring a new trial.

A criminal defendant has no constitutional right to be tried by a judge alone. "We find no constitutional impediment to con-

ditioning a waiver of [the right to a jury trial] on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him." *Singer* v. *United States,* 380 U.S. 24, 36 (1965). "An accused has no absolute or exclusive right to elect a trial by the court alone without a jury." *United States* v. *Clausell,* 389 F.2d 34, 35 (2d Cir. 1968). Rule 23(a) permits a waiver of a jury trial but does not mandate it without the consent of the court. Notwithstanding these precedents, defendants argue that the court abused its discretion in denying their motion for a nonjury trial inasmuch as the issues were complex; aged and disabled persons were required to testify for the Government and this may have stirred antagonisms in the jury toward defendants; and a jury may have been unduly influenced by Clapps' prior convictions. The short answer would be that the issues were not complex, the elderly witnesses were necessary witnesses but not as important to the prosecution's case as were Outeda and Stoss, and Clapps' convictions were proper matters for any trier of the facts, whether it be a judge or jury, to consider. Serious credibility evaluations had to be made between the testimony of Outeda and Stoss, on the one hand, and Clapps and Powell on the other. The court believed that the credibility resolution was best left to a jury of twelve. The reasons advanced by the defendants are plainly insufficient to show an abuse of discretion by the court in requiring that the case by decided by a jury.

For the foregoing reasons, the defendants' motions for judgment of acquittal and for a new trial will be denied.

William J. Nealon
Chief Judge, Middle District
of Pennsylvania

DATED: August 23, 1983

Order

Now, this 23rd day of August 1983, in accordance with the memorandum filed this day, defendants' motions for judgment of acquittal and for a new trial are denied.

William J. Nealon
Chief Judge, Middle District
of Pennsylvania